



EMPLOYMENT TRIBUNALS

Claimant: Miss D Gray

Respondent: The Archbishop Lanfranc Academy Coloma Trust

Heard at: London South Employment Tribunal

On: 06 November 2018

Before: Employment Judge Martin

Representation

Claimant: Did not attend

Respondent: Mr L Upton – HR advisor

JUDGMENT

The Claimant's claims are struck out

REASONS

1. This was a hearing to consider whether to strike out the Claimant's claims. The events in the claim go back to 2015. The Claim was presented on 26 January 2016. In considering this matter I had before me the Tribunal file which I went through in some detail.
2. The chronology is as follows. This does not record each item of correspondence on the file, just those that are necessary to explain the decision reached.

Date	Event
26 January 2016	ET1 presented
17 February 2016	ET3 and Grounds of Resistance presented
31 March 2016	Preliminary hearing during which the Claimant was ordered to send medical information to the Respondent, the full merits hearing was listed for 5 days commencing 7 November 2016 and directions were given for the final hearing.
21 April 2016	The Claimant sends her disability impact statement to the Respondent and the Respondent conceded that she is a disabled person on 2 June 2016.
31 May 2016	The Claimant applies for an extension of time to 7 June 2016 to comply with the directions.
9 June 2016	The Tribunal writes to the Claimant saying that she must supply the required information. The Claimant emails the Tribunal to say the documentation will be supplied the following day.
13 June 2016	Documentation received from the Claimant
4 October 2016	The Claimant applies for witness orders for one of her witnesses which is responded to asking what day she wanted the witness to attend.
4 November 2016	The Claimant applied for a postponement on the grounds that she was not in good health and her GP requested she was admitted to hospital for a psychiatric assessment. She says that a medical certificate and GP letter will be forwarded to the Tribunal by 6 November. The postponement was granted on the basis that the Claimant sent in medical information to support her application together with a prognosis, so the case can be relisted no later than 10 November 2016. The Claimant did supply this information but without a prognosis.
16 December 2016	The Tribunal writes to the Claimant asking for an update on her medical condition by 16 January 2017.
11 January 2017	The Claimant emails the Tribunal to advise she is not able to attend any hearing until her next assessment at the end of February and she will provide medical certificates by 16 January 2017. No certificates were received.
4 April 2017	The Tribunal writes to the Claimant asking for an update by 11 April 2017 on her medical condition specifically asking her if she was fit to attend a tribunal hearing and if not when she would be.
7 June 2017	The Claimant writes to the Claimant reminding her she

needs to send in a medical certificate and requesting she does this by 14 June 2018.

- 16 June 2017 The Claimant writes to the Tribunal saying she has just been discharged from hospital but giving no further details as requested by the Tribunal. She says she will forward a medical certificate backdated to the last certificate.
- 4 July 2017 The Tribunal sends a letter to the Claimant warning her that it is considering striking out her claim due to non-compliance with directions of 4 April, and 7 June 2017 to provide medical certificates asking her to respond by 10 July 2017. The Claimants sends in a fit note on 10 July.
- 18 July 2017 The Tribunal writes to the Claimant asking for an update by 25 July 2017 as to her medical position and prognosis saying that the medical certificate indicates she is able to attend the hearing and reminding her that the events in the case date from the summer of 2015.
- 25 July 2017 The Claimant writes to the Tribunal so say that she is bedbound and unable to attend the Tribunal and she will send a medical certificate.
- 19 September 2017 The Tribunal chases the Claimant by letter for the medical certificate.
- Unknown date Medical certificates received from the Claimant dated 5 January 2017 and 4 July 2017 which were forwarded to the Respondent for comment.
- 18 October 2017 The Respondent writes to the Tribunal saying that the notes say the Claimant is not fit for work but do not say if she is fit to attend a hearing; that the Fit note dated 8 September 017 is backdated and its validity is questioned, that the Claimant was dismissed over two years previously and requested a postponement only the day before the hearing set for November 2016 and that the Respondent's memories may have now faded.
- 17 November 2017 The Tribunal writes to the Claimant saying it can not stay the proceedings indefinitely and that if the Claimant seeks a further delay she must provide a letter from her GP or other treating physician which must give a prognosis as to when she is likely to be fit to attend with a reply being required by 1 December 2017.
- 29 November 2017 The Claimant provides a fit note for the period 29 October 2017 to 4 April 2018 but no letter from her GP or other treating physician given a prognosis.
- 22 February 2017 The Tribunal writes to the Claimant saying it will list a preliminary hearing to determine whether her claims should be struck out as the medical certificate supplied does not comply with EJ Elliott's direction of 17 November 2017, does not indicate that she is unfit to attend an

hearing, does not provide a prognosis and states that proceedings can not be stayed indefinitely. The Claimant is told she can make submissions in writing or be represented if she cannot attend herself.

- 22 February 2017 The Claimant sends an email expressing her disappointment about a hearing being scheduled as her medical certificate states she has mental health issues and was housebound.
- 26 April 2018 The Tribunal writes expressing its sympathy for the Claimant's medical situation but saying the hearing will go ahead as the event in dispute predated September 2015 and there is no prospect of a hearing being listed. The Claimant was given the option to apply for a postponement with supporting medical evidence or suggest another route to resolution.
- 8 May 2018 The Claimant sends in a report from South London and Maudsley NHS Foundation Trust dated 1 March 2018.
- 17 August 2018 The Tribunal determined that the hearing should go ahead as there was still no prognosis given in the report which was required by the Tribunal.
- 18 September 2018 Notice of hearing sent to the parties.
3. There was no further communication from the Claimant. At the hearing, the Respondent told me that it had not heard from the Claimant directly since February 2018.
 4. I was told that one of the main witnesses who heard the appeal by way of a complete rehearing has now left the Respondent.
 5. I must consider whether the Claimant's claims should be struck out based on her non-compliance with the various directions of the Tribunal as set out above. I have read what medical information is on the file and it is noteworthy that there is no information whatsoever about the Claimant's prognosis and whether she will be able to proceed with her claim in the foreseeable future.
 6. I am aware that to strike out a claim pursuant to rule 37 Employment Tribunal Rules of Procedure 2013 is a draconian sanction and should only be exercised in exceptional circumstances. Rule 37 provides that at any stage of the proceedings a Tribunal may strike out all or part of a claim on the basis of non-compliance with Tribunal orders or where the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim, provided that notice has been given to the parties who are then entitled to make representations.
 7. I checked the notice of hearing and saw it was sent to the correct addresses by post and by email. I was satisfied the Claimant had received notice of this hearing and was aware of what the hearing was listed for. The Claimant had been notified she could send a representative or make written representations.
 8. In considering whether to strike out the Claimant's claim I referred to the following case law:
 9. **Blockbuster Entertainment Ltd v James [2006] IRLR 630 CA** which held that it is necessary to consider whether striking out is a proportionate response and

that Consideration needs to be given as to whether there is a less drastic means to the end for which the strike-out power exists. Although this case dealt with a situation that arose at the final hearing, the same principles apply in these circumstances.

10. **Peixoto v British Telecommunications plc EAT 0222/07** which upheld a Tribunal's decision to strike a claim out (having considered less draconian measures) on the basis that the Claimant was too unwell to give evidence and there was no prognosis to suggest that that situation would change in the reasonably foreseeable future.
11. **Riley v Crown Prosecution Service 2013 IRLR 966** which upheld a Tribunal's decision to strike a claim out in circumstances where the Claimant was unable to participate due to depression having taken account of 1) there being no prognosis as to when the Claimant could participate and 2) the balance of prejudice to both parties.
12. I note the medical information which I have before me and whilst I am sympathetic to the Claimant's illness, I do not have, despite the many attempts to get this information over a long period of time, any indication of if the Claimant will be able to proceed with her claim and if so when that may be. The events in dispute in this case are already three years old. With current listing constraints the events will be considerably further in past even if it was possible to list the case now.
13. The right to a fair trial applies equally to the Respondent as it does to the Claimant. The Respondent was ready for the original hearing listed for November 2016 which was postponed at the Claimant's request the day before the hearing was due to start. It is now in the position that one of its key witnesses no longer works for them and the passage of time will make it difficult for effective evidence to be given. I note that witness statements have already been prepared however I accept that memories of the details and subtleties will have faded by now. I find that the balance of prejudice is with the Respondent.
14. I am satisfied that the Claimant has been given several opportunities to provide the required information and has been given good notice of the possibility of her claim being struck out if she did not comply with orders and give a prognosis of when she was likely to be able to proceed with her claim.
15. I considered alternatives to having the claim struck out at this stage, however, with the Claimant not attending the hearing and the lack of any useful medical information to inform when she may be able to proceed with her claim I could find no alternatives. For example, I considered whether the case could be dealt with on the documents alone and concluded that it could not and that the Claimant's oral evidence was required.
16. I note that the Claimant has now been unable to proceed with her claim for two years and there is no indication of any recovery which will enable her to participate in proceedings. There is no point in the foreseeable future where I can say that the Claimant will be able to proceed with her claim
17. I have not taken this decision lightly and have weighed up the prejudice to both parties. The Respondent has already had proceedings against them by the Claimant for a very long time. Considering the absence of any prognosis of sufficient improvement in the Claimant's health within a reasonable time and the fact that this case deals with events that are already significantly in the past that a fair trial is no longer possible. The Claimant has not provided the information

repeatedly requested by the Tribunal, what she has provided does not give any indication of when and if she will be able to proceed with her claim. In all the circumstances I consider it just and equitable to strike out the Claimant's claim.

Employment Judge

Date: 06 November 2018